
EH-41 Analysis of EPA s Rule Requiring That Federal Actions Conform to State Implementation Plans

On November 30, 1993, the Environmental Protection Agency (EPA) published its final General Conformity rule in the *Federal Register* (58 FR 63214). The regulations are codified at 40 CFR Part 51 Subpart W and Part 93 Subpart B. The rule is mandated by Section 176(c) of the Clean Air Act, as amended in 1990. The statutory language indicates that Federal agencies must not engage in, support in any way, provide financial assistance for, license or permit, or approve any activity that does not conform to an applicable State implementation plan (SIP) designed to achieve the national ambient air quality standards. Federal agencies are required to ensure that a proposed Federal action in air quality nonattainment or maintenance areas conforms to the SIP before the action is taken.

The following summary and analysis of the intricate conformity regulations was prepared by EH-41 (Office of Environmental Policy and Assistance) and its support contractor, and was distributed to DOE program and field offices as an attachment to the February 3, 1995, memorandum from Andrew Wallo III to Distribution, Analysis Clean Air Act (CAA) Rule Requiring that Federal Actions Conform to Applicable State Implementation Plans.

I. SUMMARY AND BACKGROUND

A. Summary of Requirements

EPA s final general conformity rule (58 FR 63214, November 30, 1993) implements §176(c) of the Clean Air Act (CAA). The rule requires that Federal agencies must not engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable SIP designed to achieve national ambient air quality standards. Federal agencies must make a determination that a proposed Federal action conforms to the SIP before the action is taken. The term Federal action is broadly defined in 40 CFR 93.152. In some cases a formal, written conformity determination will be needed before a proposed action can be implemented. It is important to note, however, that Federal actions must conform to the applicable SIP regardless of whether a formal conformity determination is required.

The regulations require that Federal agencies prepare a written conformity analysis and determination for proposed activities where the total of direct and indirect emissions of a nonattainment or maintenance criteria pollutant caused by the activity will exceed the threshold emission levels shown at 40 CFR 93.153(b). Indirect emissions are defined to be reasonably foreseeable emissions which result from the Federal action and which the Federal agency can practicably control (40 CFR 93.152). Certain activities [listed at 40 CFR 93.153(c, d, e)] are specifically exempted from the conformity determination process. Federal agencies can also establish categories of actions which are presumed to conform [40 CFR 93.153(f)]. The threshold level generally decreases as the severity of pollution in nonattainment areas increases. If necessary, a Federal agency can pursue mitigation measures to reach a determination that a

proposed activity conforms to an applicable SIP (40 CFR 93.158). The conformity determination must show that the proposed activity conforms to the applicable SIP. The final rule includes public participation requirements for other agencies and the public at 40 CFR 93.155 and 93.156. Draft conformity determinations must be advertised and the determination as well as supporting materials made available to those that request them. Federal agency responses to public comments must be documented.

B. Background

The 1990 CAA Amendments significantly amended §176(c) of the CAA. This section provides that no Federal agency shall support any activity which does not conform to a SIP designed to achieve national ambient air quality standards. Section 176(c) addresses two classes of Federal activities: 1) transportation plans, programs, and projects of the Federal Highway Administration, Federal Transit Administration, and metropolitan planning organizations (referred to by EPA as transportation conformity), and 2) other Federal activities (referred to by EPA as general conformity). The transportation conformity rule, codified at 40 CFR 51 Subpart T and 40 CFR 93 Subpart A, is not discussed in this guidance. EPA issued a final rule implementing the statutory requirements for general conformity on November 30, 1993 (58 FR 63214). The rule was effective January 31, 1994.

The requirement that the activities of Federal agencies conform to applicable SIPs is not new. The language in §176(c) that Federal agencies are not to engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable SIP and that the assurance of conformity is an affirmative responsibility of the head of each Federal agency was originally added to the CAA by the 1977 amendments to the Act. The 1990 Amendments, however, made two significant additions to §176(c). First, §176(c)(4)(A) directs EPA to issue criteria and procedures for determining conformity. The final rule issued November 30, 1993, responds to this directive for general conformity requirements. Second, the 1990 Amendments added new language to clarify when a proposed activity conforms to a SIP. Specifically, §176(c)(1) provides that conformity to a SIP means

- (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and
- (B) that such activities will not
 - (i) cause or contribute to any new violation of any standard in any area;
 - (ii) increase the frequency or severity of any existing violation of any standard in any area; or
 - (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The general conformity rule adds a new Subpart W to 40 CFR Part 51 and a new Subpart B to 40 CFR Part 93. Subpart W requires States to submit for EPA approval a SIP revision which contains criteria and procedures for assessing the conformity of Federal actions to the applicable SIP consistent with Subpart W [40 CFR 51.851(a)]. SIP revisions containing the conformity provisions are to be submitted to EPA by November 30, 1994, or within 12 months of an area's designation to nonattainment, whichever date is later. Subpart B to 40 CFR Part 93 is essentially identical to Subpart W except that Subpart B does not require a State to revise its SIP (58 FR 63215). A Federal agency planning an activity in a particular State must meet 40 CFR 93 Subpart B if the State's SIP revision has not been approved by EPA, and the State's conformity criteria and procedures if the State's SIP revision has been approved by EPA (40 CFR 93.151). This guidance cites only to the 40 CFR 93 Subpart B regulations. Readers should be aware, however, that corresponding regulations are in 40 CFR 51 Subpart W.

The remaining sections of this guidance writeup cover the potential applicability of the general conformity rule, its key requirements, and estimates of time needed to comply with the rule.

II. POTENTIAL APPLICABILITY

A. When a Formal Conformity Determination is Needed

Unless an activity is otherwise exempted (see below), a written conformity determination meeting the requirements in 40 CFR 93 Subpart B is needed for all proposed activities where the total of direct and indirect emissions caused by the Federal activity would equal or exceed the threshold amounts shown in Table 1 in nonattainment areas and Table 2 in maintenance areas. The term "total of direct and indirect emissions" is defined at 40 CFR 93.152. It is to reflect net total emissions and include emissions of criteria pollutants and precursors of criteria pollutants. Emissions which are presumed to conform to a SIP under 40 CFR 93.153(c, d, e, or f) are not to be included in the "total of direct and indirect emissions." Fugitive emissions are to be included when estimating direct and indirect emissions (58 FR 63232). The term "indirect emissions" is defined at 40 CFR 93.152 to be reasonably foreseeable emissions of a criteria pollutant or its precursors that meet the following two conditions: 1) the emissions are caused by the Federal action but may occur later in time and/or may be further removed in distance from the place of the action, and 2) the Federal agency can practicably control and will maintain control over the emissions because of a continuing program responsibility. The terms "caused by," "reasonably foreseeable emissions," and "emissions that a Federal agency has a continuing program responsibility for" are also defined at 40 CFR 93.152.

Proposed Federal actions for which the direct and indirect emissions of any criteria pollutant are 10% or more of a nonattainment or maintenance area's emission inventory for that pollutant are designated "regionally significant actions" (40 CFR 93.152). Regionally significant actions require a conformity analysis and determination even if projected emissions of criteria pollutants are below the threshold levels shown in Tables 1 and 2 [58 FR 63240, 40 CFR 93.153(i)].

A conformity determination is only needed for the particular nonattainment or maintenance pollutants that equal or exceed the threshold emission levels shown in Tables 1 and 2. For example, in an area that is only nonattainment for ozone, a conformity determination would not be needed for CO emissions even if projected CO emissions exceeded 100 tons per year.

Table 1. Threshold Emission Levels in Nonattainment Areas [40 CFR 93.153(b)(1)]

Pollutant	Degree of Nonattainment	Threshold Emission Level (tons/yr)
Ozone (VOCs or NO _x)	Serious	50
Ozone (VOCs or NO _x)	Severe	25
Ozone (VOCs or NO _x)	Extreme	10
Ozone (VOCs or NO _x)	Other ozone nonattainment areas outside an ozone transport region	100
Ozone (VOCs)	Marginal and moderate nonattainment areas inside an ozone transport region	50
Ozone (NO _x)	Marginal and moderate nonattainment areas inside an ozone transport region	100
CO	All nonattainment areas	100
SO ₂ or NO ₂	All nonattainment areas	100
PM-10	Moderate	100
PM-10	Serious	70
Lead	All nonattainment areas	25

Table 2. Threshold Emission Levels in Maintenance Areas [40 CFR 93.153(b)(2)]

Pollutant	Location	Threshold Emission Level (tons/yr)
Ozone (NO _x), SO ₂ or NO ₂	All maintenance areas	100
Ozone (VOCs)	Maintenance areas inside an ozone transport region	50
Ozone (VOCs)	Maintenance areas outside an ozone transport region	100
CO	All maintenance areas	100
PM-10	All maintenance areas	100
Lead	All maintenance areas	25

Initially, the general conformity rule requirements apply only in areas that are nonattainment or maintenance for one or more criteria pollutants [ozone (VOCs or NO_x), carbon monoxide (CO), SO₂, NO₂, particulates (PM-10), and lead]. A conformity determination is needed for each nonattainment or maintenance pollutant whose emissions exceed the threshold level. In the preamble to the rule, EPA states its intention to also apply the general conformity requirements through a future rulemaking to certain attainment and unclassifiable areas that have exceeded 85% of the national ambient air quality standard (58 FR 63214, 63228). The general conformity rule does not apply to Federal procurement actions; however, the preamble states that a future rulemaking may extend the general conformity requirements to certain procurement actions (58 FR 63215).

B. Exemptions

The regulations set out a number of actions that are exempt from the conformity determination requirement for various reasons. Exempted actions of particular interest to DOE are called out below.

First, certain actions are exempt because the emission levels associated with such actions are clearly below the threshold emission levels set out in Tables 1 and 2 [40 CFR 93.153(c)(2)]. The following exempted actions are of particular interest to DOE:

- (ii) Continuing and recurring activities ... where activities conducted will be similar in scope and operation to activities currently being conducted
- (iii) Rulemaking and policy development and issuance
- (iv) Routine maintenance and repair activities
- (vii) The routine, recurring transportation of materiel and personnel
- (xii) Planning, studies, and provision of technical assistance
- (xiii) Routine operation of facilities, mobile assets and equipment
- (xiv) Transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer

Second, actions where the emissions of a proposed activity are not reasonably foreseeable are also exempt [40 CFR 93.153(c)(3)]. The following exempted action is of particular interest to the DOE Power Administrations:

- (ii) electric power marketing activities that involve the acquisition, sale and transmission of electric energy.

Third, the following actions are automatically exempt from the conformity determination requirement [40 CFR 93.153(d)]:

- (1) Actions requiring a CAA permit under the new source review (NSR) program or the prevention of significant deterioration (PSD) program
- (2) Actions in response to emergencies or natural disasters
- (3) Research, investigations, studies, demonstrations, or training where no environmental detriment is incurred and/or the action furthers air quality research
- (4) Alterations and additions to existing structures performed in response to environmental requirements
- (5) Emissions caused by remedial or removal actions carried out under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to the extent such emissions are otherwise authorized under the NSR/PSD permitting programs or CERCLA.

Federal agencies can also establish categories of actions that are presumed to conform with an applicable SIP [40 CFR 93.153(f)]. Before designation, the Federal agency must 1) find that the categories meet the §176(c) statutory requirements and are within the threshold emission limits shown in Tables 1 and 2, 2) subject the list of categories to review and comment by the public and affected agencies, 3) document its response to the comments and make the comments and responses available to the public upon request, and 4) publish the final list of categories of actions in the Federal Register.

Proposed actions that are exempt from the conformity determination requirement because of the clearly de minimis exemption at 40 CFR 93.153(c)(2) or the exemption for unforeseeable emissions at 40 CFR 93.153(c)(3) do not need a conformity determination even if the proposed action could be regionally significant. However, a proposed action within a category of actions established by a Federal agency that are presumed to conform will need a conformity determination if it is found to be regionally significant [40 CFR 93.153(j)].

Finally, a grandfathering provision is included at 40 CFR 93.150(c). Federal activities for which 1) National Environmental Policy Act (NEPA) analysis was completed before January 31, 1994, or 2) a NEPA environmental assessment was begun before January 31, 1994, which enabled an affirmative conformity determination to be made by March 15, 1994, do not need to meet the requirements of the general conformity rule. Such activities will still need to meet, however, the statutory requirement in §176(c) of CAA that Federal activities must conform to applicable SIPs.

III. REQUIREMENTS

For proposed actions that require a conformity determination, DOE will need to meet requirements in the general conformity rule relating to conformity analyses, conformity determinations, participation by the

public and affected governmental agencies, and mitigation of air quality impacts. The requirements are summarized below; the regulations should be consulted for specific requirements.

A. Conformity Analyses (40 CFR 93.159)

Analyses prepared to make conformity determinations must be based on the latest planning assumptions for the local area. Analyses must be based on the latest and most accurate emission estimation techniques and air quality models unless written approval from the regional EPA Administrator is obtained to permit modification or substitution.

Conformity analyses are to be conducted for 1) the attainment year the CAA mandates for the local area or the latest year for which emissions are projected in the maintenance plan, 2) the year during which the total direct and indirect emissions from the planned activity are expected to be the greatest on an annual basis, and 3) any year for which the applicable SIP specifies an emissions budget.

B. Criteria for Determining Conformity of General Federal Actions (40 CFR 93.158)

The criteria for determining conformity with an applicable SIP are quite detailed and are only summarized here. A baseline requirement for all such proposed actions is that the total of direct and indirect emissions associated with the proposed activity must be in compliance or consistent with all relevant requirements and milestones contained in the applicable SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements [40 CFR 93.158(c)].

In addition to the baseline requirement, the proposed action must meet one of the following requirements in 40 CFR 93.158(a):^(a)

- (1) For any criteria pollutant, the total of direct and indirect emissions is specifically identified and accounted for in the applicable SIP's attainment or maintenance demonstration.
- (2) For ozone or NO₂, the total of direct and indirect emissions is fully offset within the same nonattainment or maintenance area through an enforceable measure so that there is no net increase in emissions of the pollutant.
- (3) For criteria pollutants other than ozone and NO₂, the total of direct and indirect emissions meets the local and area-wide air quality modeling requirements in 40 CFR 93.158(b); or one of the requirements in 40 CFR 93.158(a)(5) plus the local air quality modeling requirements in 40 CFR 93.158(b).

(a) The preamble to the final rule contains a summary table of these requirements at 58 FR 63242.

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- (4) For CO or PM-10 when the State determines that an area-wide air quality modeling analysis is not needed, the total of direct and indirect emissions meets the local air modeling requirements in 40 CFR 93.158(b); for CO or PM-10 when the State determines that an area-wide air quality modeling analysis is needed and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions meets the area-wide modeling requirements in 40 CFR 93.158(b) or meets one of the requirements in 40 CFR 93.158(a)(5).
- (5) The total of direct and indirect emissions is determined by the State to be within the SIP's emission budget (applicable when EPA has approved a revision to an area's attainment or maintenance demonstration after 1990), the metropolitan planning organization determines that the proposed action is included in a current transportation plan and improvement program that conforms to the SIP, emissions from the proposed action are fully offset within the same nonattainment or maintenance area, the total of direct and indirect emissions does not increase emissions with respect to baseline emissions (applicable when EPA has not approved a revision to the area's attainment or maintenance demonstration since 1990), or the action involves regional water and/or wastewater projects sized to meet only the needs of the population projections in the applicable SIP.

The preceding requirements are detailed, and the specific text in the regulations needs to be carefully studied when they are potentially applicable to a conformity determination.

C. Public Participation (40 CFR 93.155, 93.156)

A draft conformity determination must be announced in a general circulation newspaper serving the area affected by the proposed action. Draft conformity determinations and a description of the proposed action must also be provided to 1) State and local air pollution agencies; 2) the regional EPA office; and, if applicable, 3) affected Federal land managers, the metropolitan planning organization, and the planning organization for a nonattainment area designated under §174 of the CAA. Affected agencies and the public must be given 30 days to comment on the proposed action and draft conformity determination. Upon request, the Federal agency must make available for review the supporting materials and analytical methods which led to the draft conformity determination [this requirement does not apply to analyses conducted under 40 CFR 93.153 to ascertain whether a conformity determination is required (58 FR 63233)]. The Federal agency must document its response to all comments received on a draft conformity determination and, upon request, make the comments and responses publicly available within 30 days of the final conformity determination.

D. Mitigation of Air Quality Impacts (40 CFR 93.160)

Federal agencies can pursue mitigation measures to reach an affirmative conformity determination. Before making an affirmative conformity determination, the Federal agency must obtain written commitments from any third party persons or agencies that are to participate in implementing mitigation measures. The mitigation measures, the implementation process, applicable enforcement measures, and an implementation schedule for the mitigation measures must be committed to writing.

E. Final Conformity Determinations (40 CFR 93.154 - 93.157)

Federal agencies are to consider public comments on draft conformity determinations when making final conformity determinations. When multiple Federal agencies are participating in a project, a Federal agency may adopt the conformity analysis (but not the conformity determination) of another participating Federal agency or develop its own analysis.

Notice of the final conformity determination must be published in a general circulation newspaper serving the area affected by the proposed action. Affected governmental agencies must be given notice of a final conformity determination within 30 days after a final determination is made.

A final conformity determination lapses after five years unless the proposed action is completed or a continuous program is underway to implement the action within a reasonable time.

Ongoing Federal activities at a given site that are within the scope of a prior conformity determination do not require a new conformity determination.

If a Federal action changes during implementation resulting in increased emissions of the nonattainment or maintenance pollutant(s) beyond those considered in the original conformity determination, a new conformity determination is required.

IV. TIME ESTIMATES

The time needed to complete a conformity determination process will depend on a variety of factors including 1) the complexity of the proposed project, 2) the number of criteria pollutants for which a conformity determination is needed, 3) the complexity of local air pollution patterns, 4) the extent to which air quality models and needed planning assumptions are readily available, 5) the number and extent of public comments on the draft conformity determination, and 6) whether mitigation measures need to be pursued to reach an affirmative conformity determination. A rough indication of the time that may be needed to accomplish the steps involved in a conformity analysis and determination for a well-defined proposed activity is shown in Table 3. It may be possible to conduct portions of some steps concurrently.

V. ADDITIONAL READING

Stubblebine, S. D. Autumn 1994. Applying Conformity Determinations Under Section 176(c) of the Clean Air Act: NEPA with a Hammer, *Federal Facilities Environmental Journal*, John Wiley & Sons, New York, 5(3):319-331.

Table 3. Time Requirements for Conformity Analysis and Determination

Step	Approximate Time Range
Applicability determination (40 CFR 93.153)	One week to three months
Preparation of draft conformity analysis and determination; identification and documentation of mitigation measures if needed	Two to twelve months
Newspaper announcement and distribution of the draft conformity analysis and determination to affected agencies and the public (40 CFR 93.155, 93.156)	One week
Comment period	One month
Preparation of responses to public comments; revision of the draft conformity analysis and determination based on comments; revision to mitigation measures if necessary; preparation of final conformity determination	One to six months
Newspaper announcement and distribution of final conformity determination to affected agencies	One week